



BC

U.S. Department of Justice

Immigration and Naturalization Service

identifying information related to
prevent the unwarranted
invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
U.I.L.B., 3rd Floor
Washington, D.C. 20536

File: EAC 00 037 51192

Office: VERMONT SERVICE CENTER

Date: JAN 14 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief and additional documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is February 12, 1996. The beneficiary's salary as stated on the labor certification is \$18.70 per hour or \$38,896.00 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence

of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel submits a copy of the petitioner's 1996 Form 1120S U.S. Income Tax Return for an S Corporation and argues that:

The amended 1996 tax return of the petitioner corporation shows additional income not previously reported on the petitioner's 1996 tax return and shows that the petitioner paid the beneficiary that year consistent with the petitioner's sponsorship of the beneficiary.

Counsel further states that "[t]his return was filed with IRS last week."

There is no evidence in the record which verifies that a Form 1120X was actually filed with the Internal Revenue Service. Absent verification that the Form 1120X was filed with the Internal Revenue Service as an amended return, it has simply been altered rather than amended. The petitioner has not shown how the initially submitted return was in error and has not explained the basis for the changes to the return. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Counsel's argument is not persuasive. The only difference in the Form 1120S submitted with the petition and the Form 1120S submitted on appeal is in the amount of gross receipts. The tax form submitted with the petition shows gross receipts of \$286,884, while the tax form submitted with the appeal shows gross receipts of \$323,384. The fact remains that the tax returns both show an ordinary income of -\$2,051. The petitioner could not pay a salary of \$38,896.00 a year out of this figure.

In addition, the tax return for calendar year 1997 continues to show an inability to pay the wage offered.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage as of the priority date of the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2). Therefore, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The Associate Commissioner's decision of November 15, 2001, is affirmed. The petition is denied.